IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1601

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED NON-SUPERVISORY FEMALE EMPLOYEES OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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September 3, 1975

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Preliminary Statement

Respondents COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO ("CWA"), and ESTHER SKIPPER ("Skipper"), submit this Brief in Opposition to the Petition for Certiorari filed by AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT ("A.T.&T.") on June 19, 1975, pursuant to the request of the Clerk of the United States Supreme Court dated August 4, 1975.[1] Respondents believe

[1] Respondents did not oppose the petition for certiorari at the outset in light of the granting of certiorari in *Liberty Mutual Insurance Company* v. *Wetzel, et al.*, Docket No. 74-1245, on May 27, 1975, 43 U.S.L.W. 3261, because a decision in that action could affect further proceedings in this case.

the decision and judgment of the United States Court of Appeals for the Second Circuit (13a-26a)[2] was, in all respects, correct and therefore the Petition should be denied. In the event the Court grants the petition, respondents urge that the judgment and opinion below be summarily affirmed. Respondents are aware that the identical question raised by the instant Petition is before the Court in *Liberty Mutual Insurance Company* v. *Wetzel* (*"Wetzel"* hereafter). If the Court grants the Petition without summary affirmance, respondents urge the Court to consolidate this proceeding with *Wetzel*. The broad impact of the challenged employment policies on the employment rights of women which are presented in this action may assist the Court in reaching its decision in *Wetzel*. Respondents are willing to consent to an accelerated briefing schedule in order to permit consolidated oral argument.

Proceedings and Opinions Below

Petitioner seeks review of an order of the United States Court of Appeals for the Second Circuit, entered March 26, 1975, reversing an order of *sua sponte* dismissal of respondents' class action[3] complaint (A15) brought under Title VII of the Civil Rights Act of 1964, as amended, 42

[2] References to the Appendix furnished by Petitioner will appear in this form herein. References to the Joint Appendix on appeal to the Court below, certified to this Court by Respondents, pursuant to Supreme Court Rule 21, will appear herein by page number preceded by "A".

[3] At the time of the District Court's decision, a motion for class action certification was *sub judice* (17a). Following the granting of certiorari in *Wetzel*, proceedings were suspended to await the Court's decision, and the motion is still undetermined. In a similar action, *Communications Workers of America* v. *New York Telephone et al.*, 73 Civ. 3352, (herein *"Telco"* action) plaintiffs' motion for class action certification was granted on July 11, 1974. 8 FEP Cases 509 (S.D.N.Y., 1974).

U.S.C. 2000e, *et seq.* ("Title VII" or "the Act"). The complaint challenged, as violative of the Act, petitioner's employment practices and policies which classify women disabled by pregnancy and childbirth differently from other employees under temporary disability. This classification involves the limitation or denial to women of a wide range of employment rights, including entitlement to income protection benefits under health insurance and disability benefits plans, commencement and duration of leave, availability of reinstatement, accrual of seniority, entitlement to vacations, pensions and promotional eligibility and other rights, benefits and privileges of employment at A.T.&T.

The District Court's opinion (1a-11a) was predicated upon a finding that this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) *("Aiello")*, holding that California's exclusion of disabilities relating to pregnancy[4] from its state-administered disability insurance program for private employees did not violate the Equal Protection Clause of the Fourteenth Amendment, had determined that an employer's disparate treatment of pregnancy-related disabilities *cannot* constitute discrimination under Title

[4] Due to an amendment in California's Unemployment Insurance Code, only the exclusion of disability for normal pregnancy was before the Court at the time of the *Aiello* decision. Although A.T.&T. purports to classify disabilities arising from complications of pregnancy as compensable disabilities, this is dependent upon whether the woman so disabled has previously been classified as on maternity leave (A61). Thus, a male employee absent from work due to a prostrate condition who, during his absence, suffers an attack of hypertension, receives appropriate protection for the second disability as well. A woman absent after being placed on maternity leave who suffers an attack of preeclampsia (a form of hypertension related to pregnancy) does not receive any protection for that complication. There is thus a factual issue regarding the extent to which A.T.&T. covers these disabilities, impliedly acknowledged in *Aiello* as required under Fourteenth Amendment standards, 417 U.S. at 489-490.

VII, absent a finding that it is a pretext designed to effect invidious discrimination against women.

The Second Circuit reversed, holding that *Aiello* was not decisive of issues arising under Title VII (20a), finding that statutory interpretation, rather than constitutional analysis, governed the efficacy of a complaint alleging discriminatory employment practices commenced under an Act of Congress "designed to prohibit a broad spectrum of discriminatory [employment] evils" under its Commerce Clause power (26a-27a).[5] The Second Circuit further noted that the dismissal was inappropriate in the absence of a full record (27a).[6] Following remand, the proceedings were suspended to await action by this Court in *Wetzel* and on pending petitions for certiorari in this case and in *General Electric Company* v. *Gilbert* (No. 74-1589) and *Gilbert* v. *General Electric Company* (No. 74-1590).[7]

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[5] The Court noted that the Guidelines issued by the Equal Employment Opportunity Commission ("EEOC") pursuant to Title VII, 29 C.F.R. § 1604.10, which require employers to treat pregnancy disability in the same manner as other temporary disabilities, were entitled to "great deference", forming part of the statutory interpretation which must be considered in considering whether these discriminatory employment practices violate the Act (25a-27a).

[6] At the time of the District Court's dismissal, a substantial amount of pre-trial discovery had been conducted, although it was not completed (17a). Depositions had been taken in the *Telco* action (portions of which were referred to in the briefs and record before the District Court and the Court of Appeals, due to the substantial identity of the two challenged plans), but not in the instant case. The Court declined to examine the merits of the complaint in any further detail on an interlocutory appeal pursuant to 28 U.S.C. 1292(b) because of the limited state of the record (27a-28a).

[7] These joint petitions for certiorari involve the same action, *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va., 1974), *affd.* —— F.2d ——, 10 FEP Cases 1201 (4th Cir., 1975). References will be made to these decisions as *"Gilbert."*

Statement of Facts

Petitioner A.T.&.T. is an operating department of American Telephone & Telegraph Company (A25) which controls the major portion of the United States' telephone communications system through more than twenty subsidiary companies (the Bell System) (A186-187). More than 10,000[8] (A94, A142, A155) women are employed by Petitioner, of which approximately six percent are absent due to pregnancy during a one-year period (A59).

A.T.&T. provides disability benefits to its employees for absences which are due to inability to work. Benefits are embodied in a "Plan for Employees' Pension, Disability Benefits and Death Benefits" ("the Plan") and administered by a Benefits Committee (A85-A90). Any employee unable to work for more than seven consecutive days is entitled to the Plan's protection, regardless of the cause of the disability (A87-89, A296-297). Women disabled by normal pregnancy and childbirth are not excluded from benefits on the face of the Plan (A87-88), but through the administration by A.T.&T. of internal regulations and rules governing pregnancy (A68-74, A94-95, A98-100, A106-108, A112-115, A138-141, A145-147, A148, A151-154, A180-184, A280-283).

A disabled employee at A.T.&T. who is covered by the Plan receives extensive protection during the disability period. This protection extends beyond economic assistance in the form of income protection payments and insurance coverage for medical and/or hospital expenses, and includes protection of employment rights such as accrual of service credit (seniority) and wage progression credit.

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[8] Company statistics provided to CWA indicated that A.T.&T., as of July, 1975, employed 10,073 women and 14,864 men. Of the women, 3,289 are non-white.

Retention of service credit affects pension plan rights, permanent promotion eligibility, vacation entitlement, opportunities for transfer, susceptibility to lay-off or termination, and the amount of income protection benefits available for a covered disability (A75-79, A80-84, A86-90, A108-113, A280-282, A297).[9] Wage progression credit affects an employee's eligibility for promotion and advancement and in-grade wage increases. These critical employment rights are extended to every disabled employee under Plan jurisdiction because A.T.&T. classifies such employees as "active" (A61, A89-90, A109, A154). Women disabled by pregnancy, however, are *not* classified as "active" employees. Rather than protect these disabled women under the Plan, A.T.&T. classifies pregnancy disability under its leave of absence policies (A68-74, A282-283) which do not afford any of these benefits and rights.[10] They are thus denied employment benefits and rights extended automatically to every other disabled employee *regardless* of the reason for the inability to work.[11] The preservation of

[9] Seniority even affects an employee's eligibility for inclusion in the Company's Upgrade and Transfer Plan, adopted pursuant to the Consent Decree entered into between EEOC and Bell System employers to correct some of its discriminatory practices against women and minorities (A116-117). See, e.g., *E.E.O.C. v. A.T.&T. Co.*, 365 F. Supp. 1105 (E.D. Pa., 1973) and A185-288.

[10] A.T.&T.'s leave of absence policies do include a policy of making differential payments to employees (substantially all male) who are in military service, and extending other benefits, such as service credit to them (A63, A64, A66-67, A76, A105, A108, A109, A110, A151-152). Thus, even under the Company's leave practices women disabled by pregnancy do not receive equal treatment.

[11] The record below amply demonstrates that the Plan in effect for A.T.&T. is the same as that in effect for other Bell System employers (A121, A164), including New York Telephone Company, whose Medical Director testified at a deposition in the *Telco* action that *"We have benefits which are paid for disabilities. . . . If you are disabled, no matter what the cause . . . you are entitled to benefits,* and so you can do down any list you want [of causes of disability] and the answer is going to be yes to any condition which produces a disability, *not because of the condition because that's irrelevant, but because the impairment is sufficient to prevent the employee from doing useful work."* (A166-167) (emphasis added)

these rights for all employees except women who, by reason of biology, become disabled by pregnancy, sets this case factually apart from *Aiello*, as well as *Wetzel* and *Gilbert*, and demonstrates the broad spectrum of employment rights which are denied or limited for women alone under A.T.&T.'s policies and practices.[12]

CWA is the collective bargaining representative of all non-supervisory employees at A.T.&T., as well as other companies within the Bell System. Beginning in 1971, CWA sought negotiations with A.T.&T. to correct this discriminatory treatment of women disabled by pregnancy (A49-50; *cf.* A84). Following this unsuccessful effort, CWA filed its Charge of Discrimination with the EEOC in April, 1972 (A48). Mrs. Skipper has been an employee of A.T.&T. since December, 1970. She was disabled due to her pregnancy and birth of a daughter in 1972. She was denied all of the employment rights discussed above. After satisfying the jurisdictional requirements of the Act (A24), this action was commenced in July, 1973.

[12] The *Wetzel* case involves a disability insurance program subscribed to by all employees of Liberty Mutual Insurance Company and partially supported by their mandatory contributions, as well as mandatory discharge policies applied to women on leave due to pregnancy disability. The *Gilbert* case involves General Electric's failure to pay sickness and accident benefits to women disabled by pregnancy. This plan is employer-funded. Neither case involves the sweeping loss of other employment rights presented here, although these additional rights are central to an employee's relationship to any employer and must be considered in any decision governing employment rights guaranteed by Title VII.

ARGUMENT

I.

The Petition Should Be Denied.

Respondents respectfully suggest that granting of certiorari in this case is not appropriate. Although the question presented does raise an issue of importance in the administration of Title VII's ban on sex discrimination in employment, there is no uncertainty regarding an employer's obligations under that Act to provide equal benefits to all employees without regard to factors inextricably linked to their membership in a class protected by Title VII.[13] Nor is there any conflict in principle between the decision below and this Court's decision in *Aiello*.

At the time of entry of the decision and order below, the question presented in this Petition had been decided affirmatively by a significant number of federal courts. See, e.g., *Wetzel* v. *Liberty Mutual Insurance Company*, 508 F. 2d 239 (3rd Cir., 1975), *affirming* 372 F. Supp. 1146

[13] Respondents are aware of the contentions made by the petitioner in *Wetzel*, as well as the Bell System and other *amici curiae* in that case supporting the employer's position, that women often account for a greater percentage of disability benefits afforded than men. There is no evidence in the case at bar bearing upon the accuracy of this position. Moreover, this is not the point of the Act. Employers are precluded from considering sex, like race, as a factor in the granting or denial of employment rights. The fact that biased employment decisions save money does not change the fact that they discriminate against protected groups. The cost of equal treatment in the economic marketplace for purposes of Title VII should be as irrelevant as it is in other areas of the law. *Cf. Swann* v. *Charlotte-Mecklenburg Board of Education*, 306 F.Supp. 1299, 1312 (W.D.N.C. 1969); *Goss* v. *Board of Education of City of Knoxville, Tenn.*, 482 F.2d 1044, 1046 (6th Cir. 1973), *cert. den.* 414 U.S. 1171 (1974); *Cato* v. *Parham*, 297 F.Supp. 403, 411 (E.D.Ark. 1969).

(W.D. Pa., 1974); *Vineyard* v. *Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal., 1974); *Sale* v. *Waverly-Shell Rock Board of Education*, 9 FEP Cases 138 (N.D. Iowa, 1975) *leave to appeal den.* —— F. 2d ——, (8th Cir., Jan. 31, 1975, Misc. No. 75-8088); *Farkas* v. *South Western City School District*, 506 F. 2d 1400 (6th Cir., 1974), *affirming* 8 FEP Cases 288 (S.D. Ohio, 1974); *Satty* v. *Nashville Gas Company*, 384 F. Supp. 765 (E.D. Tenn., 1975); *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va., 1974).

In addition, the New York Court of Appeals, in a unanimous decision, held that the answer to the question presented here was affirmative in relationship to the New York State Human Rights Law (Executive Law §297, *et seq.*), the State enactment comparable to Title VII in its proscription of employment discrimination on the basis of sex. *Union Free School Dist. No. 6* v. *New York State Human Rights Appeal Board*, 35 N.Y. 2d 371 (1974). In holding interpretations of sex-based classifications under Fourteenth Amendment standards irrelevant to their validity under the statutory proscriptions of the Human Rights Law, 35 N.Y. 2d at 376-378, the Court looked at the "direct and positive focus" of legislative enactments forbidding discrimination in employment and found that an employer's personnel policies which treat pregnancy and childbirth disabilities differently from other disabilities for purposes of compensation and reinstatement discriminated on the basis of sex in violation of the law of New York. Taking special note of the *Aiello* decision and of the district court's dismissal herein, the Court declared that

> "were the Supreme Court to declare that exclusion of pregnancy and maternity benefits was to no extent based on sex, we would not be obliged to accept such

determination for the purposes of the application of our State's Human Rights Law. (35 N.Y. 2d at 377, n. 1)

In contrast to the assertion by Petitioner that "uncertainty now abounds" as to whether an employer who differentiates between disability arising from pregnancy and other temporary disabilities in a benefits program discriminates in Title VII terms (Petition, pp. 4-5), these court decisions are unanimous in finding that such discrimination exists. This unanimity was made even clearer following the issuance of the decision below by additional district and circuit court decisions finding employment policies involving disparate treatment of women disabled by pregnancy to be prohibited sex discrimination under the Act. See, e.g., *Gilbert* v. *General Electric Co.*, —— F.2d ——, 10 FEP Cases 1201 (4th Cir. June 27, 1975); *Satty* v. *Nashville Gas Company*, —— F.2d ——, 11 FEP Cases 1 (6th Cir. August 8, 1975); *Zichy* v. *City of Philadelphia*, 392 F.Supp. 338, (E.D. Pa. 1975); *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. April 10, 1975).[14] The

[14] In addition, numerous cases have determined that disabilities caused by pregnancy or childbirth must be treated by employers the same as all other disabilities or be in violation of state fair employment practices statutes or of constitutional guarantees. See, e.g., *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290 (N.D.Ohio 1973); *Black* v. *School Committee of Malden*, 8 FEP Cases 132 (Mass.Sup.Jud.Ct. 1974); *Cedar Rapids School Dist.* v. *Parr*, 6 FEP Cases 101 (D.Iowa 1973); *Hanson* v. *Hutt*, 83 Wash.2d 195, 517 P.2d 599 (Sup.Ct. Wash. 1973); *Lillo* v. *Plymouth Board of Education*, 8 FEP Cases 21 (N.D.Ohio 1973); *Scott* v. *Opelika City Schools*, 63 F.R.D. 144 (M.D.Ala. 1974); *Drake* v. *Covington Board of Education*, 371 F.Supp. 974 (M.D. Ala. 1974). The Ninth Circuit Court of Appeals recently affirmed the decision of the District Court of Oregon in *Hutchison* v. *Lake Oswego School Dist.*, 374 F.Supp. 1056 (D.Ore. 1974), *affd.*, July 21, 1975, Nos. 74-3181, 3182), noting specifically that, while *Aiello* might govern Fourteenth Amendment claims regarding an employer's refusal to permit a teacher to apply accumulated sick

decision below is thus in accord with those of five other circuits (Third, Fourth, Sixth, Eighth and Ninth), and no conflict exists among the circuits regarding the Title VII violation occasioned by an employer's failure to treat women disabled by pregnancy in the same manner as other disabled employees.

Respondents urge that these decisions present no conflict with this Court's decision in *Aiello* for the reasons set forth therein and in the persuasive opinion of the Court below. The Congressional ban on employment discrimination contained in Title VII expresses precisely the kind of legislative judgment regarding discriminatory classifications based upon sex which this Court in *Aiello* recognized as appropriate and permissible.[15] Title VII's broad scope has been repeatedly recognized and approved by the courts in the area of discrimination in fringe benefits, as well as in the cases cited above which have specifically addressed the disparate treatment of women disabled by pregnancy. See, generally, *Rogers* v. *Equal Employment Opportunity Commission*, 454 F. 2d 234, 238 (5th Cir., 1971), *cert. den.* 406 U.S. 957 (1972); *Sprogis* v. *United Airlines*, 444 F. 2d 1194 (7th Cir., 1971), *cert. den.* 404 U.S. 991 (1971); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F. 2d 90 (3d Cir., 1973).

leave to childbirth-caused incapacity, it did not govern her Title VII claim of sex discrimination. The court affirmed the lower court's determination that such disparate treatment was in violation of EEOC Guidelines and Title VII.

[15] In footnote 20 the Court declared that "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of *legislation such as this* on any reasonable basis." 417 U.S. at 494 (emphasis added). Legislation directed at eradicating the evils of employment discrimination in all of its forms, including the discriminatory limitation or denial of rights, benefits and privileges of employment to a sizeable group of women, is obviously excluded from the factual scope of the *Aiello* decision.

As the Court below recognized, a definitive finding in *Aiello* that disparity of treatment of pregnancy-related disabilities could not violate Title VII (absent pretext), "would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to treatment of pregnancy disabilities issued by the EEOC" (25a).

The issues raised by a Title VII challenge to employment policies which limit the rights of women disabled by pregnancy are completely different from those raised in the Fourteenth Amendment context of *Aiello*. The courts which have considered *Aiello's* impact on Title VII have all agreed with the Court below that the differing jurisdiction and scope of the Act require the application of separate standards for measuring prohibited conduct. Petitioner is incorrect in its assumption that this Court's Fourteenth Amendment conclusion in *Aiello* applies to Title VII, or any legislative enactment governing equal employment opportunity. *Union Free School District No. 6* v. *Human Rights Appeal Board, supra,* 35 N.Y. 2d at 377-378.

The factual matters raised in the instant case and their impact upon women extend far beyond those involved in *Aiello*. This Court's determination that California could secure the purposes of its insurance program in the manner selected without violating the Fourteenth Amendment did not affect the *employment* rights of California women disabled by pregnancy. While they were denied financial assistance, California women did not face the multitude of problems encountered by A.T.&T.'s women who are so disabled. They did not lose their job seniority, or pension entitlement or promotional opportunity. In short, the employment status of California's working women was not adversely affected by their inability to obtain insurance payments under the State's Fund. It is this effect upon

employment rights which brings Title VII into play, and which supports the distinction drawn by the court below, and the other circuit and district court decisions which have found *Aiello* to be inapplicable to the question presented here.

A significant number of other factual differences exist between A.T.&T.'s Plan and California unemployment insurance program. Employees do not contribute to the Plan; monetary payments are provided to disabled employees as a *benefit* of their employment by A.T.&T.[16] A.T.&T., like other employers, seeks and obtains advantages from providing fringe benefits to its employees. It attracts people of the competency and permanence it desires by offering such benefits. A state enacting a social welfare program, on the other hand, does not hope to attract program recipients or continue their relationship to it. Thus, a state's social welfare objectives are framed as a result of need to exercise its police powers to provide public assistance in areas which cannot be privately handled. By contrast, an employer intends to and does serve purely personal (and profitable) ends in framing employee benefit programs.[17]

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[16] A.T.&T. protects its disabled employees through payments and corresponding employment benefits which vary during each fiscal year according to the number of employees disabled during that year (A89). A.T.&T. does not use an outside insurer to cover these costs (except with regard to supplemental group life insurance not relevant here) but considers them operating expenses. See *Moody's Public Utility Manual* (Moody's Investor Service, Inc., 1974 ed.), p. 992. Accordingly, it reaps certain tax advantages. In addition, A.T.&T.'s costs must be measured against the finding made by the EEOC during proceedings leading to the Consent Decree that discrimination by the Bell System against women alone result in a saving to it of $500 million per year (A286).

[17] For example, New York, in establishing a welfare program to aid needy families, does not thereby wish to encourage needy

The assertion that no distinctions exist between this case and *Wetzel* (Petition, p. 6), is also incorrect, insofar as the *Wetzel* petition is limited to issues revolving solely around the Company's failure to make disability income protection payments to women disabled by pregnancy and discharge policies and does not involve the other aspects of employment rights denied to disabled women at A.T.&.T.

II.

In the Event the Petition Is Granted, the Order and Judgment Below Should Be Summarily Affirmed.

Respondents respectfully suggest, in the event the Court grants the Petition here, that the order and judgment below should be summarily affirmed. Summary affirmance is particularly appropriate where the record is not fully developed and where the decision on which the writ is sought was issued on a certified question.[18]

In contrast to *Wetzel,* respondents here have not been able to fully develop their case through pre-trial discovery and do not have the benefit of a full presentation of petitioner's position on the defenses asserted.[19] Absent the

families to move to the State to obtain welfare benefits. A.T.&T. wishes to encourage employees to work for it because they know they will obtain desirable fringe benefits as part of their compensation.

[18] As noted in Point I, the question certified has been resolved unanimously in respondents' favor by every district court and court of appeals which has addressed it. See cases cited at pp. 8-10.

[19] These defenses include the assertion that the challenged policies are "based upon a rational and neutral business justification" under Title VII (17a). Title VII contains no such defense. Court decisions have, however, developed a test of "business necessity" in assessing employment policies claimed to be discriminatory. See, e.g., *U.S.* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir., 1971).

"nature, details, operations and effect" of A.T.&.T.'s policies regarding women disabled by pregnancy, and a full exploration of the "reasons for [their] enactment" (27a), the ultimate merits of respondents' claim should not be adversely determined. Summary affirmance will acknowledge the absence of any conflict with previous decisions on this issue and permit the development of the full record necessary for determining the applicability of Title VII's proscription against sex discrimination to the challenged policies here.

III.

In the Event the Petition Is Granted, and Not Summarily Affirmed, This Case Should Be Consolidated With *Wetzel* and Determined On the Merits.

In the event the Court grants the Petition but declines to summarily affirm, respondents believe that the critical facts involved in this action should be before the Court when it determines the question presented in *Wetzel.* Accordingly, respondents would consent to an order consolidating this proceeding with that in *Wetzel,* scheduling oral argument at the same time, and would agree to an expedited briefing schedule to accommodate such action and eliminate any delay in deciding the issue.[20]

Respondents respectfully suggest that, in answering the question presented here and in *Wetzel,*[21] the Court has the

[20] Because of the district court's dismissal here and subsequent appeal, and the suspension of proceedings to await this Court's determination of *Wetzel,* more than a year has passed since any discovery or trial preparation occurred. A speedy resolution is obviously appropriate, both from the standpoint of judicial efficiency and to implement the mandate of Title VII. See, e.g., 42 U.S.C. §2000e-5(f).

[21] The same question is also presented in *Gilbert,* although certain subsidiary questions were also presented by both sides.

opportunity to consider, on the merits, the broad impact its answer will have upon protected employment rights. The affected employment status of women at A.T.&T., like those in other employment settings, provides a clear guide to the impact of these challenged policies upon full and equal access to the job market for all women. Any decision in *Wetzel* must be made with adequate guidance as to the full ramifications of employer policies which treat women disabled by pregnancy and childbirth in a disparate and disadvantageous manner from all other disabled employees.

The growing number of decisions discussed in Point I, *supra,* addressing challenged employment policies involving pregnancy and childbirth demonstrate the widespread use by employers of women's childbearing function as the excuse for limiting their employment rights and opportunities. These decisions demonstrate that the manner of disparate treatment may vary from employer to employer.[22] A.T.&T.'s policies, however, have the broadest impact, and should be before the Court in answering the Question Presented.

[22] In *Holthaus* v. *Compton & Sons, Inc., supra,* the employer had no disability plan. However, employees who became disabled were permitted to use accrued vacation time during their absence, and thereafter take leave without pay. Mrs. Holthaus, however, was discharged when she suffered a pregnancy-related disability. In *Satty* v. *Nashville Gas Co., supra,* women disabled by pregnancy were denied the opportunity to apply accrued sick leave to their absence. Further they lost their accumulated seniority for job bidding purposes following recovery. Men disabled, regardless of the cause, were not denied these opportunities. Both of these decisions relied upon EEOC Guidelines, 29 C.F.R. §1604.9(b) and §1604.10(b) making it a *prima facie* violation of Title VII to discriminate with regard to employment fringe benefits because of sex or because of disability due to pregnancy or childbirth.

CONCLUSION

Respondents respectfully request that the Petition for a Writ of Certiorari be denied, but that, if it is granted, the decision and order below be summarily affirmed or, in the alternative, that the Court order this case consolidated, for argument and determination, with *Liberty Mutual Insurance Co.* v. *Wetzel.*

Respectfully submitted,

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